

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Rolando Verdines Yepez,)	
)	
	Petitioner,)
)	Civil Action No. 6:16-3859-BHH
v.)	
)	OPINION AND ORDER
Cynthia Entzel,)	
)	
	Respondent.)
)	

Petitioner Rolando Verdines Yepez (“Petitioner”), proceeding *pro se*, filed this habeas relief action pursuant to 28 U.S.C. § 2241. (ECF No. 1.) In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c), D.S.C., this matter was referred to United States Magistrate Judge Kevin F. McDonald for pre-trial proceedings and a Report and Recommendation (“Report”).

This matter is before the Court upon the Magistrate Judge’s Report and Recommendation (“Report”) (ECF No. 14), which recommends that the § 2241 petition be re-characterized as a motion pursuant to 28 U.S.C. § 2255 and reassigned to the sentencing judge. The Court will also address Petitioner’s motion for leave to proceed in forma pauperis (ECF No. 16), which was filed after the issuance of the Report.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a *de novo* determination of any portion of the Report and Recommendation of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the

Magistrate Judge with instructions. See 28 U.S.C. § 636(b). The Court reviews the Report and Recommendation only for clear error in the absence of an objection. See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that “in the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation”) (citation omitted). The Magistrate Judge advised Petitioner of his right to file specific objections to the Report, and his right to respond to the recommendation that his § 2241 petition be re-characterized as a motion pursuant to 28 U.S.C. § 2255. (ECF No. 14 at 7.) Petitioner filed no objections and no response, and the time for doing so expired on February 15, 2017.

After a thorough review of the record of this matter, the applicable law, and the Report of the Magistrate Judge, the Court finds no clear error. Accordingly, the Court adopts and incorporates the Report and Recommendation (ECF No. 14) by reference into this order. It is therefore

ORDERED that the § 2241 petition is re-characterized as a motion pursuant to 28 U.S.C. § 2255, and reassigned to the sentencing judge. It is further

ORDERED that Petitioner’s motion for leave to proceed in forma pauperis (ECF No. 16) is denied as there is no fee associated with filing a § 2255 motion.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which

specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this Court's assessment of his constitutional claims to be debatable or wrong and that any dispositive procedural ruling by this Court is likewise debatable. *See Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is denied.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

Greenville South Carolina

February 24, 2017

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure.